UNITED STATES COURT OF APPEALS

FOR THE FOURTH DISTRICT

No. 79 – 1771

Johnny J. Dotson and

Daniel F. Bloch

Appellants

v.

The Mountain Mission School, Inc., et al.,

Appellees

Appeal from the United States District Court for the

Western District of Virginia, at Big Stone Gap

Glen M. Williams, District Judge

Submitted December 10, 1981 Decided October 18, 1982

Before WINTER, Chief Judge, BUTZNER and RUSSELL

Circuit Judges

PER CURIAM:

Daniel F. Bloch, pro se plaintiff, is an individual who has become interested in the activities of The Mountain Mission School, an orphanage located in Western Virginia. He has never been a resident or employee of the orphanage. He believes that children at the orphanage are illegally abused, and that public officials and private individuals have committed illegal acts, some of them harming Bloch, in an effort to cover up the abuses.

Bloch filed the present case in the district court asserting these claims and seeking assorted forms of declaratory, injunctive and monetary relief. The alleged causes of action were primarily grounded on 42 U.S.C. § 1985. Named as defendants were the orphanage and forty-two individuals, including officials of the United States, Virginia, Ohio and Florida. Named as plaintiffs were Bloch and Johnny J. Dotson, a minor who was then residing with Bloch in Florida, but who had previously resided in the orphanage. Bloch was the only person to sign any of the plaintiffs' pleadings in the district court, but he asserted that he was Dotson's legal guardian and that he was signing on Dotson's behalf as well as for himself.

The district court ultimately dismissed the complaint and related pleadings on a number of grounds, and plaintiffs appeal. While they assign twenty-four grounds of reversible error, we perceive seven separate issues which merit discussion. We will treat them seriatim, setting forth additional facts where required. We affirm judgment in part, and we reverse in part and remand for further proceedings.

I.

MANDAMUS

Bloch sought a writ of mandamus compelling federal officials to prosecute various defendants. The district court dismissed this portion of the case on the ground that mandamus

will not lie to compel the performance of an act unless it is ministerial in nature, which the initiation of prosecution is not. See Record on Appeal at Tab 36, pages 3—4. The dismissal was correct. In any event, in a subsequent pleading, the plaintiffs explicitly abandoned this portion of the case. See id. at Tab 38, page 9A.

II.

THE FREEDOM OF INFORMATION ACT

Bloch sought an injunction under the Freedom of Information Act compelling federal officials to turn over certain records to him. The district court dismissed this portion of the case on the ground that "such a suit would be against the United States and should be filed in the jurisdiction in which the plaintiffs reside [i.e., Florida] as set forth in 28 U.S.C. § 1402." Id. at Tab 36, page 4. This reasoning was erroneous. The Freedom of Information Act itself provides that suits to enforce it may be brought "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated...." 5 U.S.C. § 552(a)(4)(B) (1976) (emphasis added). The pleadings do not indicate where the agency records at issue are kept. They may well be kept in the Western District of Virginia, where the suit was filed. In a subsequent pleading, however, the plaintiffs also explicitly abandoned this portion of the case, see Record on Appeal at Tab 38, page 9, so that any error on the part of the district court was immaterial.

III.

HABEAS CORPUS

On May 29, 1975, in a state court located in the Western District of Virginia, Bloch was convicted on two counts of abduction. Bloch was charged with taking two wards of the Mountain Mission School without obtaining the orphanage's permission. As part of the present suit, Bloch sought a writ of habeas corpus overturning this conviction. The district court dismissed this portion of the case for failure to exhaust state

remedies. Bloch subsequently abandoned this portion of the case, see Record on Appeal at Tab 38, page 11, so that we need not consider the propriety of the dismissal.

IV.

OHIO ORPHANS

The plaintiffs claim that Ohio welfare officials violated Ohio law by placing Ohio orphans in The Mountain Mission School, an unapproved institution. The district court rejected this claim on two grounds: (1) Ohio welfare officials have removed the Ohio orphans from The Mountain Mission School, thereby mooting the controversy; (2) More importantly, the plaintiffs never had standing to challenge the practice. We agree that plaintiffs lacked standing to raise this issue.

V.

UNCONSTITUTIONALITY

The plaintiffs maintain that Va. Code § 63.1–218 (1980) is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The statutory provision reads as follows:

> None of the provisions of this chapter [regulating orphanages and other child-care institutions] shall apply to any private school or charitable institution incorporated under the laws of this State, which is located west of Sandy Ridge and on the watersheds of Big Sandy river, and to which no contributions are made by the State or any agency thereof.

The Mountain Mission School may well be the only child-care institution thereby exempted from regulation. The district court never mentioned this claim, although it dismissed the entire case.

As a preliminary matter, we think that the plaintiffs have failed to join a proper defendant for this portion of the case. A suit challenging the constitutionality of this statutory provision should be brought against the state, the state agency

that would regulate The Mountain Mission School but for the exemption, or the state official in charge of that agency. None of these are defendants in the present case.

In any event, we think that the statute is constitutional. We do not perceive that the distinction drawn by the Virginia legislature harms a discrete and insular minority or impinges on a fundamental interest. (Even if orphans are a discrete and insular minority, heightened scrutiny would not be appropriate because this statute draws a distinction between two different groups of orphans, rather than between orphans and non-orphans.) Therefore, the applicable test is the minimum rationality test. Only one time in the last half century has the Supreme Court struck down a statute under this test, see Morey v. Doud, 354 U.S. 457 (1957) (striking down a law that exempted the American Express Company by name from regulations imposed on sellers of money orders),[1] and recently that decision was explicitly overruled, see City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam opinion representing the views of seven Justices) (upholding a grandfather clause that exempted two vendors from a ban on pushcarts in the French Quarter). In the majority of cases of this sort, the Court has not found it necessary to write an opinion, but instead has rejected the challenge summarily. See G. Gunther, Cases and Materials on Constitutional Law, 674 n.1 (9th ed. 1975). Moreover, we are unaware of any other case where a claim of this sort was brought by a "customer" of an unregulated entity, seeking an extension of the regulation. Rather, claims of this sort have been brought by regulated entities, and the remedy, if any, was thought to be invalidation of the regulation. We conclude that there is no merit to this portion of the plaintiff's case.

---

1. The Burger Court ostensibly has applied this test on a number of occasions to strike down statutes, but these decisions

are generally interpreted as implicit extensions of heightened scrutiny to new subjects (e.g., gender-based discriminations). See, e.g., G. Gunther, Cases and Materials on Constitutional Law, 663 nn. 13, 15 (9th ed. 1975).

VI.
INJUNCTIVE AND COMPENSATORY RELIEF FOR OTHER INJURIES

Having decided the five more narrow portions of this case, we are left with an open-ended request for injunctive and compensatory relief for other injuries.

A. Jurisdiction

At the outset, it is appropriate to determine which of the many defendants are properly before us and which should be dismissed for lack of personal jurisdiction. The plaintiffs' abandonment of the mandamus and Freedom of Information Act portions of their case, earlier mentioned, took the form of an abandonment of all claims against defendants William Webster and Griffin Bell. That leaves forty-one defendants, including The Mountain Mission School. These forty-one defendants may be divided into five groups for the purpose of determining if personal jurisdiction exists:

1. The Virginia Defendants. - The Mountain Mission School, sixteen of its officers, directors and employees, and eight other individuals (Williams, McGlothlin, Persin, Shields, J. Marshall Coleman, Sergent, Osborn, and Gibson) fall into this group.
2. Makely. – This defendant is a United States Magistrate in Ohio. There is no indication in the record that he was ever served. He has filed no pleadings in the case.
3. Sawyer. - This defendant is a private attorney in Florida. He filed an answer and a motion to dismiss but failed to allege a lack of personal jurisdiction.

4. Other Ohio and Florida Defendants. - Twelve individuals (Wainwright, Griscom, Paul Coleman, Schwertfager, Donna Gallion, Mullett, Beck, Asa Mellor, Wanda Mellor, Gary Oyler, Ruth Oyler, and Ottmar Gallion) fall into this group. They filed answers that explicitly alleged a lack of personal jurisdiction.

5. Pennsylvania Defendants. - Two individuals (Charles Lambert and Lynda Lambert) fall into this group. They filed a pro se "motion to dismiss" which failed to allege a lack of personal jurisdiction.

Unless an exception is provided by federal law or the law of the forum state, a federal court may exercise personal jurisdiction over a nonconsenting defendant only if he is served within the boundaries of the forum state. See Fed. R. Civ. P. 4(f). Federal law does not create any exceptions that are even conceivably applicable to the nonresident defendants in this case. See generally 4 C. Wright & A. Miller, Federal Practice and Procedure §§ 1118, 1125, at 523 n. 3 (1969 & 1981 pocket part). Virginia state law creates only one exception that is even conceivably applicable to the nonresident defendants in this case: the subsection of the Virginia long-arm statute which covers a defendant "[c]ausing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State." Va. Code § 8.01-328.1(A)(4)(1981 Cumm. Supp.) (emphasis added). It does not appear that a Virginia court has ever construed the emphasized language, but we do not think that it extends to any of the nonresident defendants in this case. Cf. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (holding that it was unconstitutional for Oklahoma to apply a similar long-arm statute to an East Coast auto distributor and an

East coast auto retailer, even though an East Coast customer drove his auto to Oklahoma, was involved in an accident there, and allegedly was injured as a result of a defect in the auto).

Of course, a federal court may exercise jurisdiction over a nonresident defendant who consents thereto by failing to allege a lack of personal jurisdiction in his answer or in his first motion, whichever comes first. See Fed. R. Civ. P. 12(h)(1). It is clear that Sawyer and the Pennsylvania defendants consented in this manner to the exercise of personal jurisdiction over them. Makely's status is unclear. Some courts have held that a defendant who fails to respond to a complaint in a timely fashion does not thereby consent to the exercise of personal jurisdiction over him, see cases cited in 5 C. Wright & A. Miller, Federal Practice and Procedure § 1391, at 857 n.44 (1969), but the better view is that, if the defendant were served, his failure to respond in a timely fashion constitutes consent, see id. § 1391, at 857-58. Therefore, the question of whether the district court has personal jurisdiction over Makely depends on whether he was served, which is something that is not reflected in the present record.

We conclude that only the defendants in the fourth group should be dismissed for lack of personal jurisdiction at this time. On remand the district court should determine whether Makely was served.

B. The Merits.

The request for injunctive and compensatory relief is grounded upon 42 U.S.C. § 1985. Section 1985(1) prohibits conspiracies to prevent federal officials "by force, intimidation, or threat," from discharging their duties. The first half of § 1985(2) prohibits conspiracies to prevent persons from attending or testifying in federal court. The second half of § 1985(2) prohibits conspiracies to obstruct justice in state court "with intent to deny any citizen the equal protection of the laws." Finally, § 1985(3) prohibits conspiracies to deprive any person

"of the equal protection of the laws, or of equal privileges and immunities under the laws."

The factual allegations in the complaint do not implicate § 1981(1) and do implicate the second half of § 1985(2) and § 1985(3). As for the first half of § 1985(2), the complaint accuses defendant Persin of threatening Bloch in order to prevent him from testifying in a civil suit, but fails to indicate in what court that civil suit was to have been filed. See Record in Appeal at Tab 1, page 2. The complaint also accuses assorted individuals of agreeing to dismiss a federal suit brought by Ohio Welfare officials against The Mountain Mission School in order to prevent orphans, presumably including plaintiff Dotson, from giving damaging testimony. See id. at Tab 1, page 3.[2] Also, an inference can reasonably be drawn from the complaint as a whole that one purpose of the illegal conduct in which the defendants allegedly engaged was generally to prevent the filing of a federal suit or the testimony of the plaintiffs therein.

Given that pro se pleadings must be read liberally, we think that the plaintiffs must be afforded the opportunity to develop a claim under both halves of § 1985(2) and under § 1985(3) on remand in the district court if the other prerequisites for a suit under those provisions are present.

---

2. Admittedly, this allegation is improbable, since some of the same individuals filed the suit in the first place.

The district court gave five reasons for dismissing some or all of this portion of the case as against some or all of the defendants.

(1) Class-based animus was a prerequisite and was not present;[3]

(2) The statute of limitations had expired for Bloch's claims;[4]

(3) Defendant Persin enjoyed judicial immunity;

(4) The defendant Florida parole officials did nothing wrong because they had a right to supervise the conduct of parolee Bloch;

(5) The complaint did not even allege that the directors of The Mountain Mission School or sixteen other individual defendants did anything wrong.

We turn to these reasons.

While courts have disagreed on whether class-based animus is an essential element for a violation of the first half of § 1985(2), see cases cited in Kimble v. D.J. McDuffy, Inc., 70 L.Ed.2d 651 (1981) (White, J., dissenting from a denial of certiorari), they agree that it is an essential element for

---

3. Originally, the district court also held that state action was a prerequisite and was not present for many of the defendants. In a motion for reconsideration, the plaintiffs pointed out that state action is not a prerequisite for a suit under § 1985. The district court modified its order accordingly.

4. Originally, the district court also held that the statute of limitations had expired for Dotson's claims. In a motion for reconsideration, the plaintiffs pointed out that Dotson had been a minor until after the suit was filed, so that the limitations period had never started to run on his claims. The district court modified its order accordingly.

a violation of the second half of § 1985(2), see, e.g., McCord v. Bailey, 636 F. 2d 606 (D.C. Cir. 1980) (holding that it is not an essential element for a violation of the first half of § 1985(2) but that it is an essential element for a violation of the second half of § 1985(2)), cert denied, 451 U.S. 983 (1981); Brawer v. Horowitz, 535 F. 2d 830 (3 Cir. 1976) (same),

and the Supreme Court has held that it is an essential element for a violation of § 1985(3), see Griffin v. Breckenridge, 403 U.S. 88 (1971). We find persuasive those decisions holding that class-based animus is not a prerequisite for a violation of the first half of § 1985(2) but that it is a prerequisite for a violation of the second half of § 1985(2). The "equality" language that is the foundation for the class-based animus requirement in § 1985(3) is conspicuously absent from the first half of § 1985(2) but is present in the second half of § 1985(2).

The complaint clearly alleges that the conspiracy was motivated in part by animus against orphans, and we think that that is enough to invoke the portions of § 1985 that require class-based animus. In Griffen, the Supreme Court dealt with a conspiracy motivated by racial bias – the core concern of § 1985 – but stated in a footnote: "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." 403 U.S. at 102 n.9. At that point, the Griffen court cited the remarks of Senator Edmunds, the Senate manager of the Ku Klux Klan Act of 1871, which enacted § 1985. Senator Edmunds opined that the statute would cover Democrats, Catholics or Methodists. See Cong. Globe, 42d Cong., 1st Sess. 567 (1871). We have recently relied in part on those remarks in holding that § 1985(3) covered a conspiracy motivated in part by animus against members of the Unification Church (i.e., "Moonies"). See Ward v. Connor, 657 F. 2d 45 (4 Cir. 1981), cert. den. sub nom. Mandelkorn v. Ward, 50 U.S.L.W. 3570 (Jan. 18, 1982).

Since Griffen, the Supreme Court has not faced the question of what classes are protected by the portions of § 1985 that require class-based animus, and the decisions of the lower courts are impossible to reconcile, see cases cited in

Scott v. Moore, 640 F. 2d 708, 718-24 (5 Cir. 1981). We think, however, that orphans are far more analogous to members of racial minorities than are members of a political party, whom Senator Edmunds would have included, or members of other groups that have been included by the courts, see, e.g., Scott v. Moore, supra (nonunion workers.)

It is not enough, however, to conclude that § 1985 was meant to cover the conspiracy alleged in this case. It must also be true that Congress had the power to prohibit such a conspiracy. See Griffen v. Breckenridge, supra; Ward v. Connor, supra; Bellamy v. Mason's Stores, Inc., 508 F. 2d 504 (4 Cir. 1974). In Griffen, the Supreme Court held that Congress had the power to reach a private conspiracy motivated by racial bias against blacks under the Thirteenth Amendment, which is phrased as a positive command rather than as a limitation on government and thus involves no state action requirement. The Court also stated that Congress had the power to reach the plaintiffs' right to travel, which is guaranteed - like the right to be free from slavery - by a positive (albeit implicit) command, rather than by a limitation of government. The Court explicitly declined to decide whether Congress had the power to reach private conspiracies under the Enforcement Clause of the Fourteenth Amendment, the other clauses of which limit only the states.

In Bellamy, we dealt with a private conspiracy motivated by animus toward the Ku Klux Klan (an ironic development given the origin of § 1985). Neither the Thirteenth Amendment nor the right to travel was implicated, and we avoided the question of congressional power by interpreting § 1985 not to reach private conspiracies unless they implicated one of the sources of power relied on by the Griffen court. Finally, in Ward, we held that Congress had the power to reach a private conspiracy to "deprogram" a "Moonie" because one object of the conspiracy had been to interfere with the plaintiff's right

to travel. There, we said: "[T]he complaint specifically alleges that interference with the plaintiff's right to travel was one of the objects of the conspiracy and the fact that the conspiracy had other objectives is immaterial." 657 F. 2d at 48. The complaint in the present case contains numerous allegations that interference with the plaintiffs' right to travel was one of the objects of the conspiracy, so Ward compels the conclusion that Congress had the power to reach the conspiracy alleged in this case.

Another possible problem arises at this point. Plaintiff Dotson is a member of the protected class, but plaintiff Bloch is not. By its terms, the portions of § 1985 that require class-based animus do not require that the plaintiff be a member of the protected class, but only that the plaintiff be harmed as a result of a conspiracy motivated in part by animus toward a protected group. We think that the statute should be accorded its literal meaning. The Supreme Court has expressly adopted this broad rule of standing under a related statute, see Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (applying 42 U.S.C. § 1982), and support for doing the same under the portions of § 1985 that require class-based animus can be found in Griffen itself, see Novotny v. Great American Federal Savings and Loan Assoc., 584 F. 2d 1235, 1245 (3 Cir. 1978), rev'd on other grounds, 442 U.S. 366 (1979) (expressing no disagreement with the lower court's holding that the plaintiff had standing despite the fact that he was not a member of the protected class.) In Griffen, the plaintiffs alleged that they were attacked because the conspirators mistakenly thought that one of the plaintiffs' traveling party – who did not join as a plaintiff – was a civil rights worker. The Griffen Court held that the plaintiffs had standing, even if the supposed civil rights worker had been the only target of the conspiracy, simply because they were injured as the result of the conspiracy. See 403 U.S. at 103. This holding is not directly

applicable in the present case, because the plaintiffs in Griffen were members of the protected class, but the holding does seem to indicate that Bloch has standing. We therefore conclude that he does.

The district court ruled that Bloch's claims were barred by the statute of limitations. In a conspiracy case, the limitations period begins to run when the last act is committed in furtherance of the conspiracy. The plaintiffs have at least alleged that such an act occurred within a few months of the filing of the suit. See Record on Appeal at Tab 1, page 4. Upon further development of the facts, it may turn out that a dismissal of Bloch's claims under the statute of limitations would be appropriate, but we think that a dismissal on this ground at this stage was erroneous.

The district court ruled that defendant Persin enjoyed absolute judicial immunity from this suit. If the allegations against Persin, a state judge, are taken to be true – if he informed counsel for residents of The Mountain Mission School who wished to filed suit that, if Bloch testified in that proceeding, he would imprison Bloch – we think that this defendant acted in clear absence of all jurisdiction, so that judicial immunity would not apply. See Stump v. Sparkman, 436 U.S. 349 (1978). We think the district court was in error in dismissing the claims against Persin on this ground.

Because the Florida welfare officials must be dismissed for lack of personal jurisdiction, we do not consider the correctness of the district court's ruling that the defendant Florida welfare officials did nothing wrong because they had a right to supervise the conduct of parolee Bloch.

Finally, it is true that the text of the complaint fails even to mention many of the named defendants. There are many serious allegations, however, in which the actor is not named. Since pro se complaints must be read liberally, we think that it was premature to dismiss defendants on this basis

at this stage of the proceedings. A number of the defendants objected to the vagueness of the complaint and demanded strict proof. Instead of outright dismissal, the plaintiffs should be required to clarify their allegations. When this has been done, a number of summary dismissals may well be appropriate.

VII.

BLOCH'S LEGAL CAPACITY TO SUE FOR DOTSON

In the district court, The Mountain Mission School, all sixteen of its officers, directors and employees, Williams and Osborne asserted that Dotson's claims against them were not properly before the court because Dotson had signed none of the plaintiffs' pleadings. Dotson's failure to sign any of the plaintiffs' pleadings would preclude litigation of his claims against these defendants unless Bloch, who did sign all the pleadings, was an attorney or otherwise had legal capacity to sue on Dotson's behalf. See Fed. R. Civ. P. 11, 17. Bloch is not an attorney. Bloch alleges that he was appointed Dotson's legal guardian by a Florida court, but does not allege that he was appointed Dotson's legal guardian by a Virginia court. We think we must look to Virginia law to determine whether Bloch has legal capacity to sue on Dotson's behalf in a district court located in Virginia. See 6 C. Wright & A. Miller, Federal Practice & Procedure § 1571, at 780-81 (1971).

In Holt v. Middlebrook, 214 F. 2d 187 (4 Cir. 1954) we applied Va. Code § 26-59, which provides that no person not a resident of Virginia shall be appointed or allowed to qualify or act as a personal representative, or be appointed as a guardian, unless a resident is appointed as a personal representative or guardian, as the case may be. We held that this statute prohibited a nonresident personal representative from maintaining an action against Virginia residents in a district court located in Virginia unless a resident had also been appointed as a personal representative. However, we later held in Vroon v. Templin, 278

F. 2d 345 (4 Cir. 1960), that this statute did not prohibit a nonresident guardian from maintaining an action against Virginia residents in a district court in Virginia. It was our view that the right of guardian to sue in a district court in Virginia was governed by the common law of Virginia. We left that question to the district court.

Unfortunately, there is no definitive Virginia decision indicating what the common law of Virginia is with respect to the right of a guardian not appointed by a Virginia court to sue on behalf of his alleged ward. In such circumstances we are obliged to make an informed prediction of how a Virginia court would decide the question if it were presented with it.

The majority rule at common law is that nonresident guardians may not bring suit out of the state of their appointment unless they obtain an ancillary appointment from the state in which they are suing. See 6 C. Wright & A. Miller, supra, § 1565, at 754 - 56. Many states with the majority common-law rule have relaxed it by legislation permitting foreign fiduciaries to sue locally. See id. Virginia has such a statute but it is very limited in scope. Va. Code § 26 - 60 permits a guardian who has been lawfully appointed in the state where a nonresident infant resides to sue in Virginia for authority to remove property or money in Virginia to which the infant is entitled to the jurisdiction of the infant's domicile. The statute, of course, does not apply here because the purpose of this suit is not to remove property or money to which Dotson is entitled from Virginia to another jurisdiction. But we think that the enactment of the statute was clear recognition on the part of the Virginia legislature that the majority common-law rule prevailed in Virginia and that it was necessary to modify it to some extent. Since the modification is inapplicable here, our conclusion is that the majority common-law rule prevails and Bloch is not permitted to sue on behalf of Dotson in Virginia because he was not appointed

as guardian of Dotson by a Virginia court of competent jurisdiction. The entire complaint on behalf of Dotson against the defendants who challenged Bloch's legal capacity to sue on Dotson's behalf was properly dismissed for the reasons we have expressed.

VIII.

We summarize our conclusions. We affirm the district court's dismissal of: (1) the prayer for writ of mandamus, (2) the request for relief under the Freedom of Information Act, (3) the application for a writ of habeas corpus, (4) the challenge to the decision by Ohio welfare officials to place Ohio orphans in The Mountain Mission School, (5) the challenge to the constitutionality of the Virginia statute exempting The Mountain Mission School from regulation, (6) all claims against defendants William Webster and Griffen Bell, (7) all claims against all Ohio and Florida defendants other than Makely and Sawyer, and (8) all of Dotson's claims against The Mountain Mission School, its sixteen defendant officers, directors and employees, Williams and Osborne. In all other respects, we vacate the district court's judgment and remand the case for further proceedings consistent with this opinion.[5]

AFFIRMED IN PART;
VACATED IN PART
AND REMANDED.

---

5. In addition to a lack of personal jurisdiction and Dotson's failure to sign any of the pleadings, other defenses to this suit were raised below but not addressed by the district court. On remand, the remaining defendants are of course free to press any such defenses which they raised in a timely fashion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

JOHNNY J. DOTSON, et al.,

Plaintiffs

v. Civil Action No. 79–0125-B

THE MOUNTAIN MISSION SCHOOL, et al.,

Defendants

ORDER

In accordance with the Memorandum Opinion of this day, it is ORDERED that this suit be dismissed as to all defendants and stricken from the docket. Also, plaintiff is ORDERED to cease all discovery.

The Clerk of this court is directed to send certified copies of this Order to plaintiffs and to counsel for defendants.

ENTER: This 19 day of September 1979.

/s/ Glen M. Williams
U.S. District Judge

MEMORANDUM OPINION

This suit alleges jurisdiction of the court under 42 U.S.C. §§ 1985 and 1988; 28 U.S.C. §§ 1331, 1332, 1361, 1343, 1391, 1402, 1736, 2221, 2254, and 2401; and Rule 2 of the Federal Rules of Civil Procedure.

The suit seeks injunctive relief and damages in the amount of One Hundred Million Dollars ($100,000,000.00) from the various defendants for their depriving plaintiffs of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs also seek injunctive relief against the deprivation of rights, privileges and immunities granted by the First and Sixth Amendments to the United States Constitution.

The defendant, Mountain Mission School, is a private orphanage and thereby is exempt from Virginia welfare laws. It is well settled that suits brought pursuant to 42 U.S.C. § 1985 relate to defendants acting under power derived by the authority of the state, or rather, "under color of state law." The plaintiffs allege that all the acts of the defendants in this case were under color of authority vested in them by the laws of Florida and Virginia. But the employees and officers of the Mountain Mission School were acting as employees of and associated with a private orphanage and in no manner acting under color of state law. In accordance with Henig v. Odorioso, 385 F. 2d 491 (3rd Cir. 1967), cert. den., 390 U.S. 1016 (1968) employees of private orphanages are not liable for their actions under 42 U.S.C. § 1985.

Furthermore, the plaintiffs allege that in 1974 the Mountain Mission School, or some of its agents, charged the plaintiff Bloch with abduction of the plaintiff Dotson that resulted in the plaintiff Bloch being convicted in the Circuit Court of Buchanan County, Virgina on a charge of abduction. The suit further contends that plaintiff Bloch's constitutional

rights were violated because his conviction was based on a plea of guilty which he now contends was coerced. Assuming that the Mountain Mission School could be sued under Section 1985, the matters which occurred regarding the plaintiff's conviction are now barred by the two-year Statute of Limitations. Brady v. Sowers, 453 F. Supp. 52 (W.D. Va. 1978). It is further to be noted that while the plaintiffs have sued all of the members of the Board of Directors of the Mountain Mission School, it is conceded in the suit that they had no personal knowledge of anything which occurred but merely alleges that they should have known. So, there is no conspiracy alleged as to the members of the Board of Directors of the Mountain Mission School, and, therefore, the action fails. See Wilkins v. Rogers, 581 F. 2d 399 (4th Cir. 1978).

For the foregoing reasons, the Mountain Mission School; Charles M. Sublett, President; James Marvin Swiney, Vice President; Mrs. James Marvin Swiney, Secretary; Mrs. Charles M. Sublett, Treasurer; Paul M. Platt; Mabel Abbott; Jim Stanley; Minnie Grannert; Dr. Thomas D. McDonald; Dr. J. P. Sutherland; Fred Short; Herman T. Wells; Reverend Clarence Greenleaf; Mrs. Sylvia Raines; Mrs. B. D. Phillips; and, Bud Degaffrillo, all of whom are sued as either directors or employees or officers of the Mountain Mission School, are hereby dismissed from the suit, and as to them, it is stricken from the docket.

Plaintiffs have also filed suit against Robert Beck, who is described as the prosecuting attorney of Holmes County, Ohio; Asa Mellor; Wanda Mellor; Gary Oyler; Ruth Oyler; Charles Robert Lambert; Mrs. Charles Robert Lambert; Edward C. Sawyer, attorney; Birg Sergent, attorney; Willard Osborne, head jailer, Buchanan County Virginia; Roger J. Makely. U.S. Magistrate, Dayton, Ohio; Ottmar G. Gallion; Keary Bob Williams, former Commonwealth's Attorney for Buchanan County, Virginia; Donald A. McGlothlin, Delegate to the

Virginia Legislature; Pleasant C. Shields, Director, Virginia Parole and Probation Board; and J. Marshall Coleman, Attorney General of Virginia. Nothing is alleged in this suit as to any actions on the part of any of these parties which have violated the constitutional rights of the plaintiffs. Therefore, it is ADJUDGED AND ORDERED that all of the abovementioned parties be dismissed as parties defendant to this suit.

Plaintiffs have also sued Nick E. Persin, Circuit Court Judge, Buchanan County, Virginia. In the allegations in the suit, plaintiff Bloch alleges that his constitutional rights were denied him in his trial because Judge Persin had committed several acts against the plaintiff Bloch and his witnesses and other parties. The court finds that judges, unless acting in clear absence of all jurisdiction, are immune from suit under 42 U.S.C. § 1985. See Stump v. Sparkman, 435 U.S. 349 (1978). Therefore, this suit is dismissed as to the defendant Nick E. Persin.

It is further to be noted that it is an essential element of an action under 42 U.S.C. § 1985 that there be some racial or otherwise class-based, invidious discrimination. Slavin v. Curry, 574 F. 2d 1256 (5th Cir. 1978). Construing plaintiffs' complaint in a light most favorable to them, there are no allegations of any racial or otherwise class-based discrimination that would permit a suit under this Section.

The plaintiffs have also sued Griffin Bell, Attorney General of the United States; William Webster, Director of the Federal Bureau of Investigation, Department of Justice; and, Richard L. Gibson, the FBI agent in Bristol, Virginia. As to these defendants, plaintiffs request that this court order the Justice Department to file criminal charges against the Mountain Mission School and also complain that the Federal Bureau of Investigation has failed to furnish plaintiff Bloch information in his file under the Freedom of Information Act. Plaintiffs therefore have filed a motion under 28 U.S.C. § 1361 for mandamus against the Attorney General and the FBI. In this

regard, it is to be noted that the United States District Court has the authority to enter an order of mandamus against an officer or an employee of the United States; however, it is well established that mandamus shall only be entered to require the performance of a ministerial act. Vishnevsky v. United States, 581 F. 2d 1249 (7th Cir. 1978). The decision of whether or not to prosecute is a discretionary act that is vested in the Attorney General of the United States and in the Justice Department and its various agencies, including the Federal Bureau of Investigation, and it is not incumbent upon this court to order these parties to bring criminal proceedings against an individual or an organization. Therefore, the petition for a writ of mandamus is denied and the allegations against the defendants Griffin Bell, William Webster and Richard L. Gibson are hereby dismissed.

As to the plaintiffs' complaint regarding the failure of these defendants to comply with the Freedom of Information Act, such a suit would be against the United States and should be filed in the jurisdiction in which the plaintiffs reside as set forth in 28 U.S.C. § 1402. Since plaintiffs reside in Florida, the action is not properly brought before this court.

Plaintiffs have also sued Paul H. Coleman, former Assistant Director of Ohio Department of Public Welfare; David W. Schwertfager, Chief, Bureau of Services for Families and Children, Ohio Department of Welfare; Donna Jean Gallion, Director, Holmes County Welfare Department; and Mrs. Sharon Mullett, caseworker of the Holmes County Welfare Department. The allegations concerning the Ohio Department of Welfare relate to the fact that Ohio law forbids sending a child to an institution not approved in writing by the Ohio State Welfare Department. Plaintiff Bloch complains that the Ohio Welfare Department did not properly take action to remove Ohio children from the custody of the Mountain Mission School,

which was not an approved institution. The plaintiffs in this suit do not have standing to file suit for other children who may have been sent from the Ohio Welfare Department to the Mountain Mission School and it is not alleged that this is a continuing matter that is not being taken care of at this time. See Curtis v. Peerless Ins. Co., 299 F. Supp. 429 (D.C. Minn. 1969). Also, the plaintiffs make certain complaints regarding Robert Watts. Similarly, these plaintiffs do not have standing to bring any suit on behalf of Robert Watts. Furthermore, it is not alleged that the aforementioned public officials of Ohio have in any way violated the constitutional rights of plaintiffs in this suit and, for this reason, the suit is dismissed as to all of these defendants.

Suit has also been filed in this case against Louis L. Wainwright, Secretary, Florida Department of Corrections, and Rosemary Griscom, Parole and Probations Officer, Florida Department of Corrections. Certain allegations are made against the Florida Probation system and the Florida Department of Corrections, although no specific allegations have been made against the defendants who are named in this suit. Plaintiff Bloch complains that he was denied permission from the Florida Department of Corrections to take the plaintiff Dotson to California to testify before United States Senator Allen Cranston; that the Florida Department of Corrections had denied permission for Dotson and Bloch to live together; and that psychiatric examinations have been required by the Florida Department of Corrections. It appears from the complaint that the plaintiff Bloch has been paroled and is subject to the supervision of the Florida Department of Corrections. Hence, this agency has the right and duty to supervise a person under parole and, among other matters, they have the right to regulate the travel of the parolees. See generally 59 Am. Jur. Pardon and Parole §§ 77-89 (1971). For this reason, suit is dismissed as to these defendants.

Finally, plaintiff Bloch seeks habeas corpus relief based upon an improper conviction in the Circuit Court of Buchanan County, Virginia. Suffice it to dismiss this action because plaintiff has not exhausted his remedies in the state system. The federal habeas corpus statute, 28 U.S.C. § 2254(b), specifically requires exhaustion of any adequate state remedy. Although plaintiff's time for appeal has run, he can still seek state habeas corpus relief. See, Slayton v. Parrigan, 215 Va. 27, 205 S.E. 2d 680 (1974).

Accordingly, it is ADJUDGED AND ORDERED that this suit be dismissed as to all defendants and stricken from the docket.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion and Order to plaintiffs and to counsek for defendants.

ENTER: This 19 day of September, 1979.

/s/ Glen M. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

DANIEL F. BLOCH, et al.,

Plaintiffs

v. CIVIL ACTION NO. 79–0125-B

THE MOUNTAIN MISSION SCHOOL, et al.,

Defendants

ORDER

In accordance with the Memorandum Opinion of this day, it is ORDERED that plaintiffs' motion for reconsideration be dismissed. However, it is further ORDERED that the dismissal Order of this case dated September 19, 1979, be vacated as to its findings on state action requirements under 42 U.S.C. § 1985 and as to the applicability of the statute of limitations to plaintiff Dotson.

The Clerk of this court is directed to send certified copies of this Order to plaintiffs and to counsel for defendants.

ENTER: This 2 day of November 1979.

/s/ Glen M. Williams
United States District Judge

MEMORANDUM OPINION

Plaintiffs have filed a "Motion for Reconsideration" asking this court to withdraw its dismissal Order entered in the above-styled case on September 19, 1979. It is contended that this court made several errors of law in that Order. Therefore, this motion shall be treated under Fed. R. Civ. P. 60(b).

The plethora of allegations which gave rise to this cause shall not be repeated in this opinion. Upon review of plaintiff's motion, it is felt that only three issues need be addressed. Hence this court finds no merit in the remainder of the plaintiffs' charges.

The first issue revolves around "racial or class-based discrimination" which is a necessary element under a 42 U.S.C. § 1985 suit. See Slavin v. Curry, 574 F. 2d 1256, 1262 (5th Cir. 1978). In the disputed Order, plaintiffs' § 1985 suit was dismissed for failure to allege this element.

In their motion, plaintiffs now allege that the "class-based" element is satisfied because they are poor and this is discriminatory because only "poor people...fall into the trap of needing an orphanage." This conclusion may very well be true, but it is irrelevant for § 1985 concerns.

Plaintiffs have merely contended that poor people are placed in orphanages, but have made no allegations that there was an invidiously discriminatory animus toward poor people behind defendants' actions. It is this intent factor, not recognition of a possible social truism, that provides the necessary element for § 1985. See Griffen v. Breckenridge, 403 U.S. 88, 102 (1971.) In other words, § 1985 "provides a cause of action where a conspiracy is directed against a person as a member of a class; it does not provide a cause of action where the alleged conspiracy is directed toward an individual personally." Duff v. Sherlock, 432 F. Supp. 423, 429 (E.D. Penn. 1977).[1]

1 It should be noted that the Griffen and Duff cases cited above specifically dealt with § 1985(3). But, as Slavin, 574 F. 2d at 1262, points out, the racial or class-based discrimination element Griffen required for § 1985(3) has been accepted for § 1985(2) suits in at least seven circuits. This court is persuaded that those circuits have reached the correct result.

In accordance with the above, and without ruling whether or not poor people could be considered a class in this situation, this court's prior dismissal of plaintiffs' § 1985 suit is upheld.

It is next contended that the court erred in ruling that a finding of state action is required in § 1985 suits. This point is well taken and any ruling made on state action in the prior Order is hereby vacated.

Griffen, supra, made it clear that a § 1985(3) suit does not require a finding of state action, at least in racial discrimination cases, and the courts are in conflict as to whether § 1985(2) requires state action.[2] See Bellamy v. Mason's Stores, Inc., 508 F. 2d 504 (4th Cir. 1974); Stith v. Barnwell, 447 F. Supp. 970 (M.D.N.C. 1978). But, for this case, a decision need not be made because plaintiffs are already precluded from suit for failure to allege a racial or class-based invidiously discriminatory animus.

Similarly, the contention that the statute of limitations for § 1985 was tolled as to the infant Dotson is accepted and the prior Order is so altered. However, the dismissal Order is not affected because the infant Dotson was already precluded from suit for failure to allege a racial or class-based invidiously discriminatory animus.

---

2 The conflict basically centers around whether the constitutional base of § 1985(2) lay in the Thirteenth or Fourteenth Amendment. The former does not require state action, whereas the latter would require state action.

In accordance with the reasons stated above, plaintiffs' motion for reconsideration is dismissed. However, the dismissal Order in this case of September 19, 1979, is vacated as to its findings on state action requirements under § 1985 and as to the applicability of the statute of limitations to the infant plaintiff.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to plaintiffs and to counsel for defendants.

ENTER: This 2 day of November 1979.

/s/ Glen M. Williams
United States District Judge